The Opinion

12-1961

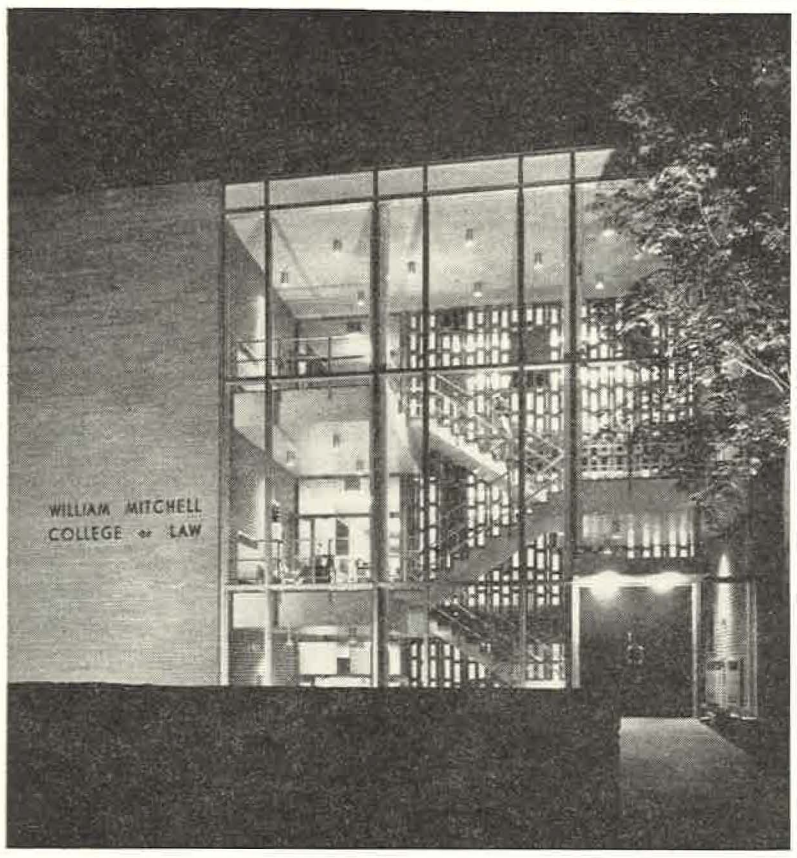
William Mitchell Opinion - Volume 4, No. 1, December 1961

Mitchell
William Mitchell College of Law

William Mitchell
OPINION

Published by the
Student Bar Association
William Mitchell College of Law

Volume 4 | December, 1961 | No. 1



The Past and—

William Mitchell—1961

By Allen Lamkin

From the dawn of civilization to the present day man's relationship with his fellow man has become increasingly complex. Law, which governs this relationship between men, has progressed along with this change in society, and those who specialize in the law have found that the preparation which was sufficient for the legal profession yesterday will not suffice today.

Early American life and society were relatively uncomplex. Its laws were, by our standards, few and simple. It was possible in the early 1800's for a young American with only a few years of formal education to read law for two years and acquire a degree at twenty, become attorney general of his state at twenty-three, a United States Representative at twenty-nine, a United States senator a thirty, and a Justice of the Tennessee Supreme Court at thirty-one. Andrew Jackson, uneducated by our standards, went on, in like manner, to become a Major General at thirty-five and the seventh President of the United States.

As the nation grew older and the area became better settled, the level and ability of the backwoods lawyer began to rise. A few day law schools were established, but it was still possible in the early 1900's for a young man to become a lawyer by passing the bar examination after having worked as an apprentice for several years under an established lawyer.

In the late 1890's a group of lawyers and judges met in St. Paul to consider the establishment of a night law school. A school of this type would enable those who were unable to attend day law school to acquire a legal education. It was hoped that the Honorable William Mitchell, who had recently retired from the Minnesota Supreme Court, could be enlisted as Dean of the new college. Justice Mitchell, however, died in August, 1900. The St. Paul College of Law opened in September of that year.

Across the river in Minneapolis, four more colleges followed in rapid succession. These were The Minneapoils College of Law, The Minnesota College of Law, The Northwestern College of Law, and the Y.M.C.A., which at that time offered a legal curriculum.

In the late 1920's, The Northwestern College of Law merged with The Minneapolis College of Law, and the Y.M.C.A. law school merged with The Minnesota College of Law. These two schools, The Minneapolis College of Law and The Minnesota College of Law, existed along with The St. Paul College of Law until 1940, when the two colleges in Minneapoils merged to form The Minneapolis-Minnesota College of Law. The prime mover in these mergers was the decrease in student enrollment occasioned by the two World Wars and the great depression.

As a result of negotiations which began in 1955, the two remaining night law schools were brought together in the final merger which resulted in the establishment of the William Mitchell College of Law.

In September, 1958, a new building was completed and the two groups, comprising over 400 students, were brought together for the first time under one roof to attend lectures presented by one faculty. The William Mitchell College of Law thus became the second largest accredited law school in the United States having classes exclusively in the evening and the only night law school in the upper midwest.

In 1900, when the first night law school was established in Minnesota, the requirement for admission was a high school diploma. In 1930 this requirement was raised to one year of college work, and by 1952 the requirement had reached three years of college preparation. Today over ninety per cent of the students attending the William Mitchell College of Law hold bachelors' degrees.

St. Louis Plays Host To Student Bar Convention

By Charles Langer

I was very fortunate in being able to attend the 13th Annual Meeting of the American Law Student Association from August 5 to August 10, 1961, in St. Louis, Missouri, as the voting delegate from the Student Bar Association of William Mitchell College of Law. The host school was Washington University, and its Student Bar Association, The January Inn, acted as the host committee. Highlights of the meeting ranged from an Orientation Workshop to the ALSA "Founders Day" luncheon.

The Orientation Workshop was an innovation for annual meetings. Here the delegates were introduced to the activities of the ALSA. President Dan Batchelor presided at the workshop, at which the various national ALSA officers, the members of the Host School Committee, and the committee chairmen were presented to the assembled delegates.

The American Bar Association Assembly Session, held in the Civic Opera House, Kiel Auditorium, was a very interesting and impressive function of the ABA. After the welcome by Governor John M. Dalton of Missouri and the response by Judge W. St. John Garner of Texas, many distinguished guests were introduced. Among these were Justice Tom Clark of the U. S. Supreme Court, the Master of the Rolls of England, the President of the Canadian Bar Association, the President of the Inter-American Law Association, and our own ALSA President, Dan Batchelor. All members of ALSA who were present were recognized.

The highlight of this ABA opening session was the annual report of President Whitney North Seymour. He first stressed the brotherhood of the law profession, including the lawyer-teacher relationship, the young and the old and the judge-practitioner association. He emphasized that the most important thing in our judiciary system today is the independent Bench and Bar. This greatly distinguishes the free countries of the world from countries dominated by domestic or foreign dictatorships. He added that in fact, when the Communists first start to take over a country, the first thing which is eliminated is the independence of the Bench and Bar. He urged that the one thing which every lawyer can do to help preserve our great country is to help maintain confidence in the courts.

President Seymour also stressed that the great rights and liberties which we Americans enjoy today came from the Creator and not the State, as was evident to our forefathers when they wrote the Declaration of Independence. They promised that we would defend these rights in whatever way necessary. One of the ways advocated by Seymour is a wider use of international law to form a durable and lasting peace throughout the world. He emphasized that this was not an "egghead" concept, but is a part of the lawyer's duty to help maintain law and peace.

He was of the belief that the Soviet Union will not support this program until it is forced to do so by world opinion. It is our duty to help strengthen favorable opinion for a strong program of international law, for this is the hope of weak and underprivileged countries. The president's last comment was that keeping the fortitude and steadfastness which our forefathers exhibited so well will bring us through once more.

Another interesting and instructive presentation of the ABA was the Conference on Personal Finance Law, presented by the Junior Bar Conference, which produced argument of a legal question regarding consumer finance important to businessmen and consumers. The counsel selected from the Junior Bar Conference by its officers were: Attorneys for the Plaintiff-Appellee, William R. Cogar, of Richmond, Virginia, and C. Paul Jones from our own Twin Cities. Attorneys for the Defendant-Appellant were Carl W. Nielsen, Hartford, Connecticut, and John G. Weinmann of New Orleans, Louisiana. The Chief Justice of the moot Appellate Court was Chief Justice Laurance Hyde of the Supreme Court of the State of Missouri. One of the Associate Judges was Fred J. Moreau, Dean of the University of Kansas Law School. The other Associate Judge was Robert G. Storey, Jr., of Dallas, Texas.

(Continued On Page 2)

Dean To Continue

It has been announced by Andrew N. Johnson, President of the Board of Trustees of William Mitchell, that Dean Stephen R. Curtis has been asked to continue his duties at William Mitchell after expiration of the original four year contract of 1958.

In announcing the Dean's acceptance, President Johnson said, "We feel that Dean Curtis has been dedicated to the task of building William Mitchell College of Law into one of the important institutions of legal learning in the country, and we are happy that he is willing to continue in that work."

Three Portias

Freshmen Begin Four-Year 'Terms'

On September 11, 1961, 129 young men and women received four year sentences in St. Paul. Once again the defense, "ignorance of the law," proved inadequate. For their common crime, gross ignorance, they are now doing time at William Mitchell. A number of those sentenced will receive time off for bad behavior.

To more effectively aid in the rehabilitation of this group, so they may again take their places as respected members of society, we must learn a few facts about them.

Those sentenced range from 21 to 47, averaging 26 years of age. They come from various parts of the continent, from Alabama to Manitoba, and from Maine to Nebraska. One quarter of those represented were from outside of Minnesota.

Three young ladies are included in the group, two of whom have attended institutions outside the United States. One of these is an English teacher and another is a receptionist.

Of the men involved, 60 percent are married. Their children number from zero to eight. The average student has 1.47 children including 1.3, 0.6, and 1.8 in three cases.

Educationwise, those incarcerated possess excellent backgrounds. Ninety-five percent have one or more degrees, representing 31 colleges and universities.

Student occupations vary widely. They include one CPA, three teachers, three Air Force personnel, one Naval officer, one basketball coach, seventeen insurance men, several chemists and engineers, and many business and banking specialists.

Representatives of fields related to law are one Internal Revenue Agent, one U.S. Marshal, two tax examiners, three law clerks, four patent trainees, five deputy or assistant clerks of court, and two who are employed by the West Publishing Company.

In the realm of accomplishment the group has several notables. These include: Harry Sieben, U.S. Marshal and former Minnesota Highway Safety and Liquor Control Commissioner; Ron Johnson, former Gopher "great" and presently assistant basketball coach at the University of Minnesota; Commander Arpad Toth, U.S. Navy pilot; and Major Richard Chrysler, U.S. Air Force.

Business tycoons included are: Aaron White, who became president of his own chemical manufacturing firm at age 23; and Robert Hillstrom, who is president and general manager of a realty firm.

Accomplishments in other fields were made by Gilbert Richey, Jr., who has attended Purdue, Butler, and the University of Minnesota and who, incidentally, is the father of eight children.

May the forthcoming experiences be beneficial to those involved, and may it be not too much to bear for the innocent wives and children of those sentenced.

WILLIAM MITCHELL OPINION

Carol A. Paar ..... **Editor**

Wayne Vander Vort ..... **News Editor**

Staff: Michael J. Gallagher, James Gibbs, Dennis Holisak, Allen Lamkin, Kenneth Mitchell, and Robert Rahn.

Published by the Student Bar Association of William Mitchell College of Law, 2100 Summit Ave. St. Paul 5, Minnesoa. Issued semi-annually.

Volume 4 **December, 1961** **No. 1**

The Students Speak —

Challenge To The Bar

Any discussion these days of "professional responsibility" ends up on a note of "let's raise the standards of the bar". Certainly this is an innocuous objective, even if it does state it's own conclusion. But if this is a desirable goal it is also a poor place to stop, for as one goes into the problem of "how to" achieve it he runs into a plethora of practical economic problems which face the legal profession, as a profession, today. So what appears to be an item of legal ideals turns out to be a facade which hides the real intent and purpose of the statement, which is to reduce the numbers in, or coming into, the profession. This intent is based in turn on fear that the bar is "overcrowded" and the false corrolary that legal incomes suffer because of it.

We say false because the matter of legal income is a complex collateral issue. It rests in part on the fact that country lawyers are trying to live off a "geographic pie" which won't support them very well, while the metropolitan lawyer is living off an "economic pie" that will. As for the other part, it rests on false economic doctrines which the legal profession assumes will do the job; the "toothache" income theory, the "collection plate" theory, the "winner take all" adversary system, and the penurious disposition of money by governments and business. These are the real roots of the lawyers' income and income distribution problems, not just simply "overcrowding".

We fail to see where a reduction in the Hennepin-Ramsey county bars would produce more business writing prospectuses in Lake County, or vice versa. As for improving legal incomes by improving legal competence, Darrow himself would have trouble getting enough personal injury suits against railroads in a good many Minnesota counties to make more than a pittance. Perhaps it is all right if the small town medical GP goes out of business, along with the small acreage farmer, but country lawyers following the same trend are more than removers of boils and sowers of wheat: their contributions to community existence cannot be readily or adequately replaced from service at a distant point. A loss here is a total loss to the social roots of our existence, and the trend here can create only less than "minimum legal care" for a significant number of people.

On this basis, it won't be necessary for the bar to worry about legal population or legal income. The law of supply and demand will take care of both these problems, until, like the engineers, the onslaught will be upon them. Then what is the bar going to do about standards? After all, it takes a good many years to make a competent attorney, and we can rightfully assume they will be needed to serve the great increase in adult population which will occur in the next ten years, regardless of where these people decide to live.

But if the general facts point to an actual future "shortage" of trained legal personnel, there is a startling lack of economic studies in depth as to the future needs of the bar. There is in fact no Bureau of Legal Economics on the national level set up to do the job, as was pointed out by Reginald Smith in the American Bar Journal, Vol. 46, p. 483 and p. 1201. This means we do not have so much a problem of "raising standards" as creating them, because, until someone puts together enough statistical information to create a per capita-geographic numeric standard, any argument about there being "too many lawyers" will have to rest on the scanty information available. And unless this is done as a national effort, the only result we can hope to accomplish is a plague of local surpluses and national shortage, the ever-present spector of want in the midst of plenty.

Since we do not have the resources to create such statistical evidence, and it is the bar which has asserted the position of "overcrowding", we say the burden of proof must rightly and heavily fall on it. We certainly can't hope to create any realistic standards without such facts, and we refute the allegation that we can continue to live on testimonial evidence. This is our challenge to the bar.

Kenneth Mitchell

ALUMNI ARE REQUESTED TO SEND THEIR CORRECT ADDRESS TO SCHOOL OFFICE.

ALUMNI ATTENTION:

Please send information about yourself, or other Alumni, to:

WILLIAM MITCHELL OPINION

2100 Summit Avenue

St. Paul 5, Minnesota

We want to print news about YOU!

Prof. Nadler Recovering

Professor Charles E. Nadler, who has been visiting professor at William Mitchell since 1958, was expected to return this fall for a full teaching assignment. Instead, he was drafted for an unexpected term in a New York hospital last summer. He is making a full recovery at his home in Macon, Georgia, and it is hoped he and Mrs. Nadler will soon be heading again to the north country.

Fraternity News

Delta Theta Phi opened the school year by sponsoring two well attended functions. The first of these was the all-school smoker which was held on Tuesday, October 3rd, at the University Club in St. Paul. One hundred and seventy students availed themselves of this opportunity to become acquainted with their fellow classmates and faculty members and learn more about the Fraternity.

On November 11 Ramsey Senate sponsored an all-school dance which was held at the University Club. Over 100 couples enjoyed the melody of the Bill Bright Orchestra and danced to their music from 9 until 1 a.m.

Starting at 2 o'clock on November 11 Delta Theta Phi initiated approximately 15 new members, who had been pledged previously at an October 31 smoker. After the initiation all of the actives of the Fraternity were entertained at a steak supper served by the University Club. The Senate was privileged to have the Honorable Donald P. Barbeau as guest speaker and Patrick W. Fitzgerald, Master of Ceremonies.

The Senate tentatively plans to hold a joint smoker with Mitchell Senate of the University of Minnesota in December and two smokers for members of the Fraternity in the spring of 1962.

Foster Appointed To ALSA Committee

The American Law Student Association has announced the appointment of Thomas A. Foster, fourth-year student, to the committee on World Peace Through Law.

This committee will work on an expansive program during the year, giving special attention to the newly adopted foreign student program.

(Continued From Page 1)

John Vojtech, President of the Canadian Law Student Association, was in attendance during the entire meeting. He brought greetings from his association and made mention of the ALSA assistance given to the Canadian Association. He stated that his organization is still in its formative years and suggested to the delegates that a closer contact with Canadian law schools be maintained, particularly in the fields of debating and moot court competition.

At the Host School breakfast, an interesting and inspiring talk on the subject of Defending Unpopular Causes and Clients was presented by Morris Shenker, an attorney from St. Louis. Mr. Shenker had emigrated to St. Louis from Russia when he was sixteen years old. He attended St. Louis University where he received both his B.A. and LL.B. degrees. He has served as Judge of the Court of Criminal Correction and also lectured at the University of Texas. Dean Lesar, of the Washington University Law School, when introducing Mr. Shenker, described him as "a man with a heart."

Shenker stated that criminal lawyers would never win any popularity contests. He feels it is unfortunate that most attorneys shy away from defending unpopular causes and clients. Shenker pointed out that although it is sometimes hard on the individual and even his family, he still feels that attorneys of America are not performing their duties to themselves, their bars and the Constitution of the United States if they do not engage in this type of work. When an accused person is on trial he is already at a disadvantage. He has been arrested, interrogated and confined without benefit of counsel. Usually, the man is not familiar with the legal principles involved; he probably hasn't much money and consequently many times cannot obtain "competent" counsel. Shenker predicts the time will arrive in the not too distant future when large law firms will have excellent criminal lawyers in the firm as well as those specializing in such fields as taxation and corporations. It is not the duty of the criminal lawyer to help convict the accused. There is no such thing as a guilty person until the competent person or persons make that decision, who will be the judge or the jury, depending on the circumstances. The attorney should never pass judgment on his client, and if he does, he is denying his client rights under the Constitution of the United State. Shenker emphasized that even though an attorney's family may suffer, it is his duty as a lawyer to accept this type of employment. If he does not, there will be a real breakdown of law enforcement.

The professional seminar in "Medical Malpractice in Today's Society" provided a distinguished panel, which explored the various facets of this most important interprofessional area.

The Association has grown from 46 Charter Member student bar associations to 130 member associations in twelve short years. The highlight of the business of the meeting was the adoption of the indvidual law student membership proposal of the ALSA Board of Governors. The newly-elected Board of Governors was charged with the responsibility and duty of implementing the individual law student membership program in 1962. The adoption of the individual membership proposal amounted to a great change in purpose of the Association — going from an association whose membership was limited to school student bar associations to an association made up of individual law students as well as student bar associations. It is expected that many more advantages will accrue to the individual law student as a result of this change in purpose of the ALSA, thereby adding to the professional growth of each individual member.

It is my sincere recommendation that more delegates from each member law school be permitted to attend the 1962 annual meeting to be held in San Francisco next August, and future annual meetings. The quality of the national organization, the caliber of the delegates, and the hard work involved in preparing seminars, workshops, and discussion groups cannot but help inspire the delegates and members with regard to the fine work and purpose of the American Law Student Association.

DICTA By The Dean

No doubt the recent development of most far-reaching importance to our school is the strengthening of our faculty by the addition of several outstanding members, as reported in this issue of the Opinion. They bring to us a desirable admixture of maturity, experience and accomplishment, and also the enthusiasm and eager curiosity of youth. They come with a variety of educational backgrounds from some of the best colleges and law schools. Everyone who has met these new teachers is sure that the school has taken another sound step in the endless process of enriching the instruction of our students.

Our enrollment at the beginning of the semester was again over 400. This year the percentage of beginning students who have college degrees is 95, as compared with 90% in recent years. The military build-up that started in the late summer kept a number of men from enrolling. The build up has been accomplished, not by increasing the drafting of men with no military experience, but by re-activating older men who have had some active service and are now in the reserves. This has affected an age bracket that involves not only men contemplating entering a school such as ours, where the average entering age is 26 or 27 years, but it has also forced several of our upperclassmen to withdraw from school during this semester.

The commencement address last June by Judge E. Barret Prettyman was such a gem that the William Mitchell Opion is taking the unusual step in printing it in full. Whether you were present at commencement or not, you will enjoy reading it.

As this is written, we have just been assured of another great Commencement program for next June 12. Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit has agreed to be our Commencement speaker. He is a native of Anoka, Minnesota, a graduate of Carleton College and Harvard University Law School, a former member of the law faculties at the Universities of Iowa, Michigan and Pennsylvania, and, in addition to having served since 1940 as a distinguished federal judge, he has for many years been the Director of the American Law Institute. Those of you who have not yet heard him speak will be glad to know of another of his qualifications. He is a brilliant and witty speaker. William Mitchell is appreciative and pround of the high caliber of its Commencement speakers.

The William Mitchell Opinion, which made its first appearance in May, 1959, has, in that short span, accomplished so much for the school by keeping students, alumni and friends all over the country informed and interested in what is going on at the school that we should not be surprised when the publication brings us another dividend; but some of us have not yet recovered from the excitement of one recent occurrence. Last June I received a letter from Howard W. Babcock, an alumnus of the class of 1941. Mr. Babcock is United States Attorney at Las Vegas, Nevada. He wrote:

"In the May 1961 William Mitchell Opinion, I note that you have a display case in your library for rare law books.

"While in England during World War II, I purchased a four-volume set of Blackstone's Commentaries. Volumes I and II were published in 1770; Volume III, in 1768, and Volume IV, in 1769. Volumes III and IV are first editions. If you would care to display this four-volume work, I would be most pleased to present it to my alma mater by way of gift.

"May I hear from you at your pleasure."

His offer was of course accepted with enthusiasm and appreciation. We recently received the four volumes, which are in excellent condition. Two of the volumes are, indeed, first editions. They make a most valued addition to our collection of rare volumes. We welcome this opportunity to express the gratitude of the William Mitchell College of Law to this generous alumnus.

Are there other alumni with rare books?

THE LAW — AS I SEE IT

By Hon. E. Barrett Prettyman

Following is the address in full which was presented at the 1961 William Mitchell commencement exercises by the Hon. E. Barrett Prettyman, one of the Judges of the District Court for the District of Columbia.

President Johnson, Dean Curtis, Ladies and Gentlemen:

I am both honored and happy at being here. Of course the extreme honor and pleasure is in the degree you have announced you will confer upon me. That is a precious possession I shall cherish always. Then I am honored and made happy by the distinction of the group who invited me. There were several collaborators — Judge Sanborn, Judge Burger, Judge Blackmun, President Johnson, Dean Curtis, Mr. Lee Slater of the West Publishing Company and Mr. Wayne Davies who is the official reporter for our court. I must mention especially Judge Warren Burger, who now sits with me on the court and who is an alumnus of this school. I have developed respect, admiration, and a vast affection for him. We disagree, but I dislike people who always agree; I like men who are belligerently in error upon occasion. In the second place I am glad to be here because you are a night school. I hacked out my law degree in a night school. I taught public school in the daytime, assisted in coaching athletic teams in the afternoon, and traveled an hour each way every evening to get that precious parchment. The day school boys undoubtedly have more chance to learn the law, and so I suppose they really do learn more than we did; but one thing I assert — those of us to whom each evening's lectures and quizzes were an agony of accomplishment, prized more highly each morsel of instruction that was offered us, each sub-item of the law that was unveiled to us, each hour that moved us closer to membership at the bar. Of course the boys who must earn their living while taking daytime courses share this glorious sense with us. But, however much we share it, it is still ours and I, for one, glory in it. One thing about your Bulletin puzzled me. What on earth did you do with Wednesday evenings? Georgetown made us attend all five evenings. And in the last place I am happy to be here because, while your school is named for your great Justice William Mitchell, whom of course I did not know as a younger lawyer, I watched his son from a distance during his tour of duty in Washington. He ranked in my book with the greatest at the bar of these times — John W. Davis, Newton D. Baker, Charles Evans Hughes, Herbert Pope. I thank you from the bottom of my heart for letting me be here.

I submit as my subject "The Law —As I See It." I shall submit several propositions, principally two. The first is an affirmation. The law, as I see it, is a science, a part of the science of human relationships. Now, before you reject that proposition as obviously absurd, permit me to develop it. Let us look first at some of the characteristics of science and then at the law. The first and basic characteristic of science is that it is a search for truth. Sometimes it is said that science is truth, but that is merely a pleasant arrogance of lesser scientists. The dictionaries say science is systemized knowledge, but "knowledge" in that definition includes opinion and theory as well as certainty. Much of accepted scientific fact is false. Science as the real scientists know, is basically a **search** for truth. What is currently called scientific fact is really no more than the best belief of the moment. Much of it is not really true because the scientists have not yet learned the truth as to so very many matters. Illustrations troop to mind. In 1490 the scientific fact was that the earth is flat; Columbus was a scientific eccentric. Fifty years ago the chemistry books taught there are ninety-two irreducible species of matter, called elements. The present notion, as you all know, is that all matter is composed of electric charges and the various species of matter are merely varieties of number and arrangement of the charges in atoms. Until very recent years medical authorities, including the pharmacopoeias, said that nicotinic acid is deadly poison. But today it is recognized as one of the vitamins and we take a bit every day. Physicians bled President George Washington with leeches. One of the charges against General Billy Mitchell (no kin to your William Mitchell, I believe) for which he was court-martialed was that he attempted to foist upon the Army the fantastic notion that man might fly faster than sound. So we might go on indefinitely. Scientific knowledge consists of currently accepted scientific fact and theory. It is the best we know to date, but some of it is true and some of it is not true. Science is the search for that which is true.

The next characteristic I note is that some scientific facts are discovered and some are created by man. Electricity was discovered, but the generation of electricity by a whirling armature in a magnetic field and the conduction of the energy by copper wire to a light bulb are scientific facts which were invented by man. The facts of nature have existed from the creation of the earth. The raw material for radio waves existed in the time of the Babylonian Empire, and so did the natural phenomena which support an airplane. Penicillin has always existed. But of course such facts do not become part of science until they are discovered. Science takes either or both of two courses, the discovery of natural truth or the production of new facts.

Scientists in their daily work must do the best they can with what they know, even though they realize the imperfections of their knowledge. For example, engineers building airplanes must do the best they can with what they know. They would like very much to land the plane straight down, or start it straight up, or have it hover motionless, but they do not as yet know how, except to the limited capacity of the present design of a helicopter and of dirigibles. Zoologists would like very much to eliminate Japanese Beetles and the Mexican Bean Bugs, but they do not as yet know how. So they must do the best they can with poisons in limited areas, quarantines, inspections and other makeshifts, the best they know. The medicoes are frantic to stop, destroy, eradicate cancer, but they do not know how. So they do the best they can with surgery and x-rays and some drugs.

Thus it is quite clear that the present whole of every science consists of two parts, (1) the application to daily problems of that which is the best presently known on the subject and (2) the never-ceasing search for answers not yet known.

The never-ceasing search for new answers to old problems has two striking characteristics in the scientific world. One is the persistence of the search, and the other is the reluctant caution with which a new discovery or invention is accepted. Our friends, the doctors, are ever pressing for new cures, but they are just as skeptical about adopting a new discovery as they are keen about making it. Engineers and physicists are always seeking solutions to the problems of air flight, but their every discovery and invention, no matter how eagerly hailed, is subjected to long grueling tests before it is offered for use. The scientific way of accepting a new answer is to try it out experimentally until it has been proven. This balance between zealous searching for the new and caution in its adoption is a characteristic of the truly scientific method.

Now, let us look at the law, its characteristics and its difficulties. The law deals with human relationships. These are many and varied. There are the relationships between man and man, between man and woman, among groups of people, the family, partnerships, corporations, and finally governments, small and great. They revolve about people and property, actions and events. They involve an infinite variety of facts. They are utterly simple and unutterably complex. These relationships must be arranged and controlled, lest chaos be complete. To that end there must be rules. Those rules are the law. The law consists of a body of rules which govern relationships.

The difficulties and problems of the law are pretty much the same as those of other sciences. We know quite a bit, but we know that we do not know so much more. We have discovered true answers to many problems. Thievery and murder are certainly wrong. We know that unfettered power of any sort is dangerous and we seek to prevent it. We know that for nations to settle their differences of opinion or of interest by slaughtering their prime specimens of physical and mental excellence is obviously an incorrect rule, but we do not seem to be able to establish a correct rule. We do pretty well in many areas but not very well in others. We know full well that we do not know the answers to many of our problems. The prevention of crime, the control of commerce, the distribution of goods, as, for example of food, the ownership of property, the problems of the juvenile, the indigent, the incompetent are unsolved problems. The rules of the air and of space and of atomic energy are not yet discovered. We know that fifty different sets of rules in one nation for the relationship of husband and wife is a wrong system. The list of our unsolved problems is well-nigh limitless. And we know it.

As is the case with most other sciences, the law is in part discovered and in part invented. There are in the law, as I see it, certain natural rules. Many basic rights are natural; many moral strictures are natural. This is a moral world, as I see it. Man discovers those rules. Other laws are invented, and this list is long. Corporations, currency, rules of the road, and so on indefinitely. We discover in part and we invent in part.

That law is a science, that is, in basic part a search for truth, presupposes, of course, that there are true and correct ultimate solutions to the problems of human relationships. Of that I am firmly convinced. My own belief is that man was created by an Intelligence, but even if that were not so, I would still believe that animal-man can live in a state of maximum well-being, that that state is definable, that man desires to achieve it, and that it is achievable. I do not believe that the human race is condemned forever to an existence of disturbance, fear, oppression, economic want, injustice. There are true and correct ultimate solutions to the problems of human relationships.

Thus, as I see it, an important basic part of the practice, the teaching, and the administration of the law is a search for better answers. The law is not merely that which has been established. The corporation, monogamy, and due process of law once were new. Something new has been added to the law from time to time, because the seeking mind of man discovered or invented a better rule for the service of man's well-being. That process has not ceased. The mind of man has not atrophied. Quite the contrary, more and more men, more and more actively, more and more intelligently, are seeking answers to the problems in this vast labyrinth.

I interject that the adoption of that which is newly discovered or invented in the law should be with the same caution as that with which scientists in other fields accept the new. The adoption of a new solution after rights have accrued frequently involves a denial of a right already established, but an established rule may in the course of the years, by the occurrence of events and change of customs, etc., become an instrument of injustice rather than of justice. This capacity for change is one of the proud features of our common law system. My point here is that keen search for the new and better and extreme caution in adopting the new are not inconsistent. Together they constitute the truly scientific process; in the law as in every other science.

Of course, the most important part of practice and administration of the law, time-wise and money-wise, is the daily application of the best we currently know. But that is not a Univac operation. A robot cannot practice law any more than it can practice medicine or build houses. The day-by-day practice, and also the administration, of the law consists of reaching live solutions to living problems. Cases are not quiz program questions the answers to which are in a book somewhere. They are problems, mostly having to do with the relationships of human beings. A divorce is not a compendium of plagiarized papers and stereotyped pronouncements. It is a complex problem of human relationships, the intricacies of human behavior, the requirements of a pressing society, the future of children, etc., etc. A will is not a jumble of unintelligible Seventeenth Century obscurities taken from a book. A will is usually the climactic act of a person's whole lifetime effort. The drawing of the simplest will, properly approached, is a problem in human relationships of the most intricate and delicate sort. A man wants to leave all his property to his wife. A flood of questions is unloosed by that simple idea, if the lawyer is the scientist he ought to be. The fact is that the carelessness with which many lawyers permit hard-working, thrifty people to toss out the window, or into the outstretched hands of unscrupulous volunteers posing as advisers or investors, or into the maw of consuming litigation, the sweatstained savings of a lifetime is appalling. An architect who drew plans for a building with care proportionate to the sad process of many lawyers drawing wills would be barred from practice long before he starved to death or was prosecuted. The same is true in respect to the drawing of contracts, the trial of lawsuits, and the argument of cases. The work of a lawyer is a series of problems, no two exactly alike, which concern the relationships of human beings, some simple and some baffingly complex.

We could go on with other common features of the systems known as sciences and the system of the law. The thesis I submit to you is that the law is not dead; it is alive. The law is no more dead than is physics, or chemistry, or astronomy, or geology, or biology. The law is not an ancient language like classic Greek, the conjugation of the improper verbs of which is to be learned by rote and repeated parrot-like in answers to questions. It is not even a delightful literature of the past to be read for interest and studied for style. The law is the process of dealing with actual, present, live problems of human beings and their activities. Full comprehension of the law is not acquired by memory; the law requires the application of active, living intelligence to the raw material of people and events.

The whole of the law is the whole of the truth as to human relationships. Thus, the whole of the law consists of two parts. One is the daily application of the best that is known to date; and the other, equally important, part is the unremitting search for new and better answers. The lawyer, the law teacher and the judge are under two obligations. One is to apply daily the best we know to date. The other and equal duty is to search unceasingly for better answers than we now know. Both are living processes.

And now I come to another phase of my subject. We have an expression of which we are very fond and very proud. It is "government by law." What does that mean, as I see it? A law is a rule. The Oxford Dictionary says Law means "The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects." Then "government by law" means government by rules. It means we formulate and adopt rules and then govern by applying those rules. As the Dictionary definition indicates, sometimes rules are made by a law-making body created for that purpose. Sometimes they are made by our common-law system, which means that a given rule has for so long and so often appealed to the sense of right and justice of many people that it becomes established as a rule of law, and is so declared by the judges.

(Continued On Page 4)

The Law As I See It

(Continued From Page 3)

Once a rule is made, the duty of executive officers and of judicial officers in our system is to carry out that rule. They have no other duty or authority. You may sometimes hear the term "judicial discretion." Chief Justice John Marshall said many years ago: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." [1]

This system of ours is in direct antithesis to another system in vogue in some places on the earth, and sometimes discussed approvingly and even sometimes followed in this country. That theory is that a judge, having a dispute before him for decision, ought to do whatever seems to him just and right and proper at the moment. I confidently assert to you that such is not our system.

Let me try to make plain the matter as I see it. Of course, if all men who come to the bench were wise, independent, impartial and without causes or predilections, it might be well to leave all disputes to their unfettered fiat. But not all judges are so. Our ancestors long ago decided it best to have rules, and to bind all government officers by those rules. If you think about it — put yourselves in the frame of mind of the barons before Runnymede for instance, or of the men who gathered at Philadelphia and made a written Constitution, — you will agree with that decision. In the next place, in our concept of things human beings have rights — endowed with inalienable rights, our forefathers said. Such rights are part of our natural law; the Bill of Rights reminds the federal government it must not impinge upon them. Those basic rights are rules; and moreover, they can be enforced only if there are binding rules requiring their enforcement. If a court could uphold your freedom of speech or not, as it pleased, you would have no freedom of speech. Our courts are bound by rules to uphold your rights. Without rules there are no rights.

Next let us note that in every controversy there are at least two parties, adversaries, usually active, sometimes merely potential but nevertheless real. In a civil action there are plaintiff and defendant. In a criminal case there are the accused and the state, the people. Justice, as I see it, is the balance of right as between the two sides. It is not the service of the interest or the benefit of either one side or the other. In our system the justice of a given situation is predetermined objectively by a rule. When thereafter a factual situation arises justice is done by applying the rule. Justice is not done by ad hoc evaluation of personalities, circumstances or emotions.

People sometimes use the word "justice" to mean gentleness, mercy, a benign consideration. Here we must note a difference between the justice which may be embodied in a rule of law itself and the justice involved in the administration of that law. In making a rule the law-makers may well, and frequently do, incorporate distinctions of age, economic condition, citizenship, sex and many other circumstances. They often put in a law a degree of flexibility. They may be merciful, benign, gentle. But in our system, the administration of the law is a different matter altogether. At this stage, the law, whatever it is, governs. Justice at this stage is the application of the rule. This justice is cold, utterly objective, impartial, impervious to emotion. It is the same for rich and poor, old and young, male and female, white and colored. The law itself may obtain distinctions. But the administrators of the law, be they executive officials or judges, can make none. When we say "administration of justice" we really mean, as Chief Justice Marshall pointed out, the application of the law.

Thus it is that the results of the administration of justice in our system is frequently harsh indeed to one party or the other. If a will is neither holograph nor witnessed, it is invalid no matter what the financial plight of its beneficiaries. A plaintiff in a civil action for damages arising from an automobile collision must prove negligence; and, if he cannot, he cannot recover no matter how morally certain it may be his opponent was at fault. A plaintiff who neglects to bring his action within the statutory period loses. And so on into more complicated fields.

A reference to baseball may illustrate the point. That a man gets three strikes and no more and that a fly ball which lands outside certain lines is foul are fixed by rules. The umpire applies the rules. He does not say, "Well, this batter is a little fellow and a rookie, and that pitcher is a veteran and rich and mean. I'll call this next one a ball whether or no." What is harsh for the batter is good for the pitcher, and contrariwise. The ump pays no attention to that. He governs according to the rules exactly as they are written. The justice of the situation is written in the rule itself. This is what we mean by government by law.

This basic doctrine applies to judges in all phases of judicial duty — whether deciding a case, ruling on evidence, instructing a jury, acting on petitions or motions, or voting on appeals. Absent flexibility in the applicable law, a judge has no power to try to do what he happens to think is best or better for one or the other of the two opposing sides before him. If a law is not just, the law itself should be changed. Of course, a judge may have difficulty in deciding what the law on a given point is and judges may, and do, disagree on that. But once the applicable rule of law is ascertained, it must be applied. To that end, among others, we have Appellate Courts.

Quite frequently the application of a rule to a given situation cannot be justified by rationalization. Thus, if a rule requires a given act to be done within thirty days, it is impossible to justify by reasoning alone the invalidity of the act if done within thirty-one days. If a rule says a person cannot vote until he has passed his twenty-first birthday, it is impossible to justify a refusal to permit him to vote at twenty years and ten months of age. You cannot rationalize a rule that if the first baseman's foot is on the bag the runner is out, but if the foot is one inch off the bag the runner is safe. Whenever you attempt to rationalize a rule in respect to a given factual situation, you are likely to be in trouble.

Judge Learned Hand relates an incident concerning Mr. Justice Holmes [2] which is pertinent here. The great Yankee from Olympus said, as we all know, "I hate justice." What he meant, Judge Hand opines, was illustrated by this story. The two drove down to the Supreme Court Building one day. As they parted, Justice Holmes to go in to a conference of the court, Judge Hand said, "Well, sir, goodbye. Do justice!" Holmes replied emphatically, "That is not my job. My job is to play the game acccording to the rules."

One other related phase of this subject I must mention. You frequently see tabulations, or scorecards, on judges in respect to various causes or social doctrines. Judge so-and-so voted so many times last year pro-labor or pro-criminal or anti-civil rights or pro-poor man and so on. As I see it, such tabluations are grossly insulting or ought to be. As I see it, a poor man is just as likely to be wrong on a point of law as is a rich man; and conversely a billion-dollar corporation is as likely to be wrong on a point of law as is its indigent opponent. Neither a labor union nor a trade association, brilliant though their counsel may be (as indeed they usually are) is invariably correct in its legal positions. Indeed I doubt if they ought to be; they have causes and interests to advocate and protect. But the administration of the law knows no causes or interests, or ought not to. My own notion on this business of statistical evaluations of judges by causes or interests is so strong that I really believe they are subversive of the administration of justice.

The body of the law should be just. The established processes of the law should be just. But the administration, the application, of the body of the law and its processes must be according to the prescriptions of the law and not according to a court's criteria of justice apart from the rules.

Why all this on your graduation night? Because I would have you, as you enter our great profession, believe as I do, that the law is a living process, not a sarcophagus of mummies, and that "government by law" is not a tasteless, odorless, colorless, powerless cliche, but is a concept of government which is meaningful, definite, strict, right, frequently harsh, designed for strong free men, not for serfs or the subservient, the best of all systems in the long run. I would, if I could, prevent your straying off into marshes and quicksands drawn by the lure of will-o'-the-wisp sirens, whispering abstract justice disembodied from rules. That ghostly shadow is not our system.

Now may I mention some less abstruse features of the law as I see it. I ask myself some questions and briefly answer them. I shall not dwell upon them.

Question One: How does one succeed at the law? Answer: By work. There is no other road to success at the law. Sad though it be, the fact is that the vast majority of young lawyers do not and will not work; hence many young lawyers do not succeed. What do I mean by work? I mean a grinding persistence which knows no limits of time or strength or energy. I mean effort outside the requirements of one's normal employment. I mean, for example: Learn to write. Learn to write a sentence in English which can be understood and cannot be misunderstood. Can you write such a sentence? Do you happen to realize the vastness of the amount of litigation which concerns only the question of what somebody meant when he wrote something? Statutes, appellate court opinions, contracts, especially insurance policies, wills, rules and regulations. Learn to speak. This is an art acquired only by hard work. The gift of gab is a great handicap to a young lawyer. It sounds well, but an ebullient orator at a negotiation table or at an appellate court lectern, is a sad and useless spectacle. Learn to probe the facts — not just ascertain them. Learn to exhaust the authorities — not just find them, or some of them, but exhaust them.

Question Two: Is competition tough in the practice of the law? Answer: In the first few years, yes. But if you are a good lawyer the competition gets less and less as the years go on.

Question Three: How does one get clients? Answer: The first clients come by accident, or by inheritance, or by marriage, or by way of a firm to which one is attached. After that clients come from satisfied clients. The secret to a clientele is a good job well done.

Question Four: What is the lawyer's greatest art? Answer: Undoubtedly it is clarity. Clear thinking, clear writing, clear speaking.

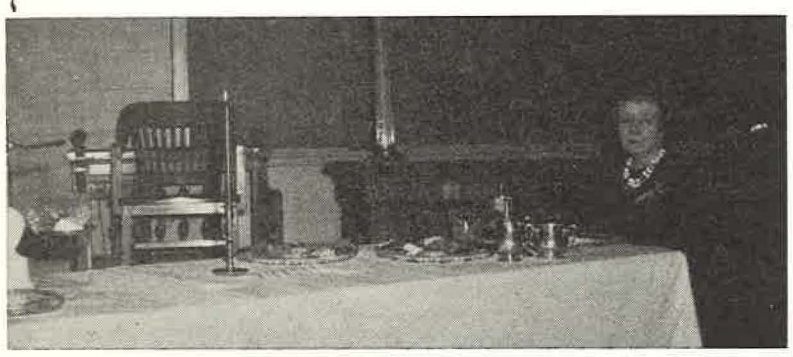
Question Five: What ability of a lawyer pays the highest? Answer: As in every other profession or business the highest pay goes to those who have the ability to make correct decisions. When I was young I was told the way to become wealthy was to get a client who was old and rich and scared. But a life-time of observation has

(Continued On Page 8)

[1] Osborn v. Bank of the United States, 22U.S. (9 Wheat.) 738, 866 (1824).

[2] THE SPIRIT OF LIBERTY, 306-307 (3d ed. 1960).

Law Wives Entertain at Annual Party



By Beverly Rosenthal

The William Mitchell Law Wives organization began its third year of operation with a party at the school on September 27, to welcome all freshman wives and wives of transfer students. Seventy three wives out of a potential 82 attended. Dean Stephen R. Curtis explained the purpose of the group is "to improve the understanding of the members of this organization, as wives of law students, of the problems, ambitions, standards, and responsibilities of law students and of lawyers, to be of assistance in every possible way to the students and to the law school and to promote social fellowship among the William Mitchell Law Wives." The speaker, Mrs. Phyllis Jones, 1960 alumna, described the new experiences in law facing the students and advised the wives as to how they can best help their husbands achieve success in this field. Chairman of the party, Mrs. Donald Hassenstab, chose the school colors, purple and light blue, to decorate the serving tables.

The first regular meeting of the club was held October 4, at the school. Mrs. Hilton Mason gave an inspiring talk entitled, "Lady and The Law". Mrs. Mason is a practicing attorney, mother of law student James Mason and a grand spokeswoman for law and life.

Judge Thomas Tallakson, District Court of Hennepin County, Juvenile Division, spoke on "Troubled Youth of Our Time," at the November 1 meeting. On December 6, Mr. Glenn, Twin Cities florist, presented a program on Christmas decorations. Wives of Alumni are welcome and encouraged to attend the meetings.

Right To Sue For Prenatal Injury Upheld

By Donald F. Zibell

Fourth year student, William Mitchell College of Law; Public Accountant, Bonlay, Anderson, Waldo and Co.; B.A. degree, University of Minnesota.

Early Law

This discussion deals with the right of an infant to sue for prenatal injuries sustained while nonviable in its mother's womb. Until recently the unanimous rule of law has been that an infant could not maintain an action for injuries received before birth.[1] In fact, a 1945 treatise states the rule as follows: "At common law and in the absence of a statute to the contrary, an infant has no right of action for injuries sustained by him while **en ventre sa mere.**" [2]

Representative of the growing line of cases that has almost completely reversed this rule within the short span of fifteen years is **Sinkler v. Kneale.**[3] The plaintiff in the **Sinkler** case was allegedly born Mongoloid as the result of injuries received in an automobile collision. The car driven by the infant's mother was, according to the complaint, negligently struck in the rear by the defendant's car. This resulted in injuries to the mother one month after conception of the infant plaintiff.

Relying on an earlier decision,[4] the Pennsylvania Common Pleas Court sustained defendant's objections to the complaint and entered judgment for the defendant, holding that the infant had no cause of action. On appeal to the State Supreme Court the decision was reversed and remanded. An infant may recover in tort for injuries sustained before it was viable.[5] In reversing its previous holding in the **Berlin** case the court relied heavily on the current state of medical knowledge that a child is in separate existence from the moment of conception, and is not merely a part of its mother's body. The court reviewed the status of the law in other states and concluded that the current trend in this country is toward allowing recovery for prenatal injuries. According to the compilation in the case, eighteen states allow recovery, four deny it, and another four indicate recovery may be possible under certain circumstances, but presently deny it.[6]

Bell Dissents

In a dissenting opinion,[7] Justice Bell felt compelled by the doctrine of stare decisis to follow the previous decision since he did not believe there had been any recent developments in medicine to justify a change in the law. Justice Bell foresaw adverse effects in allowing the suit since he believed the next step would be to allow the child to sue the mother, the doctor, or anyone else for any failure to use due care before birth, thus causing increased litigation and greater family discord. Furthermore, the difficulty of proving proximate cause would open the door to purely speculative and fictitious claims.

Dietrich Case

Any discussion of the development of the law on prenatal injuries must begin with **Dietrich v. Inhabitants of Northampton.**[8] This appears to be the first American or English case passing on the question and it was consistently cited for over sixty years as authority for denying recovery to infants injured before birth.[9] There the court, through Mr. Justice Holmes, denied liability to the personal representative of a child who died a few minutes after birth from prenatal injuries. The child was born prematurely four to five months following conception after its mother had fallen on a defective highway and miscarried. The decision rested on the complete lack of precedent and the concept that before birth a child is merely a part of his mother without separate existence or personality. The **Dietrich** case arose under a wrongful death statute and the child was probably non viable, but its holding has been broadened by later courts citing it as authority to deny recovery even where the child survives.[10]

Irish Law

The second important case on the subject was decided in Ireland in 1890.[11] The case involved a common carrier and the court decided it on contract rather than tort law. The infant plaintiff was not allowed to recover for prenatal injuries because the defendant carrier had contracted only with the mother and not with the plaintiff. Thus the court avoided the separate entity question.

The next recorded case on prenatal injuries was decided by the Illinois Supreme Court in 1900.[12] The infant plaintiff was injured ten days before birth by a projection from an elevator shaft when his mother was being transferred to another floor in the defendant hospital. Accepting Mr. Justice Holmes' view in the **Dietrich** case, the majority held that a child before birth was a part of its mother and was only severed from her at birth. In a strong dissent,[13] Justice Boggs argued that a viable child which could live separably from the mother had a cause of action, and that contrary to Holmes' contention a precedent under common law was not necessary to establish the right.

By this time there were sufficient precedents to establish the rule of no recovery. Between 1900 and 1946 the highest courts in nine states considered the question of prenatal injuries under common law and all denied a cause of action.[14] California was the only exception [15] and its decision came with the aid of a statute which presumed a child conceived, but not yet born, to be an existing person to the extent necessary for protection of its interests in the event of its subsequent birth.[16] Frequently, lower courts in the other cases cited above would allow recovery, only to be reversed on appeal.[17] A 1924 Pennsylvania lower court allowed recovery, but the decision was not appealed.[18] The case appears to have been nullified by the Pennsylvania Supreme Court's later decision in **Berlin v. J. C. Penney Co., Inc.**[19] Canada allowed a cause of action as early as 1933;[20] however, the decision did not have an immediate impact in the United States.

The Restatement of Torts followed the common law cases decided before its adoption in 1939, and stated: "A person who negligently causes harm to an unborn child is not liable to such child for the harm."[21]

The turning point probably came in 1946 in the federal court case of **Bonbrest v. Kotz,** [22] where an action by a viable child for a prenatal injury was sustained based solely on the common law. However, the first American court of final jurisdiction to allow a common law recovery for injuries incurred before birth was **Williams v. Marion Rapid Transit, Inc.,** in 1949.[23] Shortly afterward, Minnesota allowed the personal representative of a stillborn child to bring an action for its wrongful death since it was viable at the time of the injury.[24]

As the principal case points out, since 1949 seven states have overruled former decisions denying recovery, and nine states dealing with the question for the first time have upheld recovery. These are all cited in **Sinkler v. Kneale** together with the eight states that deny recovery.[25] Four of the latter are described as strongly indicating that reversal is now likely, depending on viability and other circumstances.

The Pennsylvania Court in the **Sinkler** case was impressed by the fact that the four jurisdictions on which the **Berlin** case relied have all reversed themselves and at present uphold the right of action when the child is born alive.[26] Thus with sufficient precedent for reversal and the current state of medical knowledge behind it, Pennsylvania became the most recent state to allow recovery for injuries sustained before birth.

The position of the courts before 1946 is summarized in the dissenting opinion of **Sinkler v. Kneale.**[27] Basically, the reasoning behind the no cause of action rule originated by Justice Holmes was that a child **en ventre sa mere** was not a separate person, but was a part of the mother. One could owe no duty to a person not legally in existence nor to one whose presence was not readily foreseeable. Any injury to the unborn child which was not too remote to be recovered for at all was recoverable by the mother.[28] As a practical matter the courts considered the difficulty of proving causal connection between the negligence and the injury. They feared a multitude of fraudulent and fictitious claims would result if recovery were permitted. Furthermore, it might cause increased litigation and greater family discord because the logical extension was to allow the child to sue the mother and anyone else who caused injuries, directly or indirectly. Also, stare decisis influenced some judges who believed in the finality of the law on which people should be able to rely. To them this was a problem for the legislatures not the courts. Collectively these arguments were difficult to overcome.

Recognition of a cause of action in prenatal injury cases developed step by step. The first cases allowing recovery emphasized the fact that the child was viable at the time of the injury.[29] A viable child is defined as a' fetus that has reached such a stage of development that it can live outside of the uterus independently of the mother.[30] Usually this commences in the sixth or seventh month, but it may occur earlier. In the case of viability it was possible to overcome the argument that the child was not a separate entity. This was dramatically illustrated in **Williams v. Marion Rapid Transit, Inc.,** where the mother died and the injured viable child taken from her survived.[31] It could not, therefore, be argued that this child was not a separate person at the time of the injury.

Once the theoretical arguments were overcome, it was not too difficult for the courts to set aside the practical hindrances to recovery. The problem of proof is not unique to this area of tort law and does not justify the denial of a remedy. Advances in the field of medicine have lessened the uncertainty in proving causation. A strict application of the rules of evidence should protect one from false and fraudulent claims. This was amply illustrated by a Wisconsin decision very similar to the principal case.[32] A child allegedly born Mongoloid as the result of an auto accident had been allowed to recover in the lower court, but the case was reversed on appeal because the court said there was not sufficient evidence of causation.

The answer to the argument that increased litigation would result is that if one has an actionable right, a court should be available to grant a remedy. Justice Bell's apprehension of greater family discord [33] is not a likely result. As a practical matter a child does not usually sue its parents.

Neither is stare decisis a bar to recovery in those states which have previously considered the question. This principle applies mainly to decisions which invite reliance such as in the fields of contract and property law where people are more likely to order their affairs based on existing law. One who is negligent has no right to argue that he acted in reliance on a rule barring recovery for prenatal injuries. "The law of negligence is primarily common law, whose great virtue is its adaptability to the conditions and needs of changing times." [34] As stated by Justice Williams in reversing Justice Holmes:

"Although [the] doctrine [of stare decisis] is salutary it may be more important in a given case that the court be right, in the light of later examination of authorities, wider and more thorough discussion and reflection upon the policy of the law, than that it adhere to previous decisions." [35]

It was an inevitable result that recovery would be extended to the nonviable fetus once the viable theory had become sufficiently entrenched. There was no justifiable distinction between the two as far as the injured child was concerned. He had a right to enter the world with a sound body regardless of when the injury occurred.

Any denial of recovery because of nonviability is arbitrary and unfair. Medical science recognizes that the embryo becomes a separate being from the time of conception. This view is found in current oaths of doctors. The pertinent sentence in the Geneva version of the Hippocratic Oath as adopted by the World Medical Association comprising thirty-nine national medical societies including the American Medical Association reads, "I will maintain the utmost respect for human life from the time of its conception." [36] The International Code of Medical Ethics in defining a doctor's duty states, "A doctor must always bear in mind the importance of preserving human life from the time of conception until death." [37]

Rights Upheld

The law with respect to property, inheritance and criminal law recognizes one's rights from the time of conception. Those who argue for eliminating the viability distinction say it is illogical not to afford the same protection to unborn children in the field of tort law.[38]

Perhaps the distinction between viable and nonviable fetuses is more an illusion in the eyes of judges and writers on the subject than it is real. Judges who write the decisions emphasize they are allowing recovery because the child was viable [39] and note writers criticize them for being too narrow-minded.[40] Yet no jurisdiction which has allowed recovery to a viable fetus who survived has later denied recovery to a child who survived an injury suffered before it was viable. If the language of the cases limiting recovery to the viable

(Continued On Page 6)

1. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884).
2. 43 C.J.S. *Infants* §104 (1945). However, the 1961 pocket supplement reports a change as follows, " . . . the modern rule is that a right of action does exist."
3. 401 Pa. 267, 164 A. 2d 93 (1960).
4. Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940).
5. Sinkler v. Kneale, 401 Pa. 267, 270, 164 A. 2d 93, 96 (1960).
6. *Id.* at 269, 164 A. 2d at 95.
7. *Id.* at 270, 164 A. 2d at 96.
8. 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884).
9. See, *e.g.*, Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1913); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).
10. See, *e.g.*, Lipps v. Milwaukee Electric Ry. and Light Co., 164 Wis. 272, 159 N.W. 916 (1916).
11. Walker v. Great Northern Ry., 28 L.R.Ir. 69 (Q.B. and Ex.Div. 1890).
12. Allaire v St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).
13. *Id.* at 361, 56 N.E. at 640.
14. Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1913); Lipps v. Milwaukee Electric Ry. and Light Co., 164 Wis. 272, 159 N.W. 916 (1916); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Stemmer v. Kline, 128 N.J.L. 455, 26 A. 2d 489 (1942); Berlin v. J. C. Penney Co., Inc., 339 Pa. 547, 16 A. 2d 28 (1940).
15. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939).
16. Cal. Civ. Code, § 29 (1941).
17. See, *e.g.*, Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937).
18. Kine v. Zrickerman, 4 Pa.D. & C. 277 (1924).
19. Berlin v. J. C. Penney Co., 339 Pa. 547, 16A. 2d 28 (1940).
20. Montreal Tramways v. Leveille, 4 D.L.R. 337 (Can. Sup. Ct. 1933).
21. Restatement, Torts §869 (1939).
22. 65 F.Supp. 138 (D.D.C. 1946).
23. 152 Ohio St. 114, 87 N.E. 2d 334 (1949).
24. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
25. 401 Pa. 267, 269, 164 A. 2d 93, 95 (1960).
26. Woods v. Lancet, 303 N.Y. 349, 102 N.E. 2d 691 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412 (1953); Smith v. Brennan, 31 N.J. 353, 157 A. 2d 497 (1960); and Keyes v. Construction Service, Inc., 165 N.E. 2d 912 (Mass. 1960).
27. 401 Pa. 267, 270, 164 A. 2d 93, 96 (1960).
28. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Ind. Ct. 1884).
29. See, *e.g.*, Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334 (1949), Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
30. Dorland, Illustrated Medical Dictionary p. 50 (23d ed. 1957).
31. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334 (1949).
32. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis. 2d 343, 99 N.W. 2d 163 (1959).
33. Sinkler v. Kneale, 401 Pa. 267, 272, 164 A. 2d 93, 98 (1960).
34. Smith v. Brennan, 31 N.J. 353, 157 A. 2d 497 (1960).
35. Keyes v. Construction Service, Inc., 165 N.E. 2d 912 (Mass. 1960).
36. Taylor, *Liability for Negligent Injury to the Unborn*, 36 Dicta 323, 325 (1959).
37. *Ibid.*
38. See, *e.g.*, Comment, 5 St. Louis U.L.J. 151 (1958).
39. Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 (1949).
40. 63 Harv. L. Rev. 173 (1949) and 34 Minn. L. Rev. 65 (1949).
41. Wendt v. Lillo, 182 F. Supp. 56, 62 (N.D. Iowa 1960).
42. Muschetti v. Charles Pfizer & Co., 144 N.Y. S 2d 235 (Sup. Ct. 1955); Norman v. Murphy, 268 P.2d 178 (Cal. Ct. App. 1954).
43. Comment, 26 Fordham L. Rev. 684 (1958).
44. Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 (1949).
45. Wendt v. Lillo, 182 F. Supp. 56, 62 (N.D. Iowa 1960).
29. *E.g.*, Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947.
30. *E.g.*, Schwartz, *The Supreme Court — October 1959 Term*, 59 Mich. L. Rev. 403, 420 (1961).

State Police Power and Common Carriers

By John B. McGrath, Jr.

Fourth year student, William Mitchell College of Law; Employed by Minnesota Department of Employment Security; Third-year class representative, Student Bar Association; staff writer, The Opinion; B.A. degree, University of Minnesota.

The knotty problem of determining the extent to which state police power[1] is curtailed by the federal constitution[2] in matters affecting interstate carriers is the subject of numerous Supreme Court decisions, the latest of which is **Huron Portland Cement Co. v. City of Detroit.**[3] This case involved the constitutionality of the Detroit Smoke Abatement Code[4] as applied to ships federally licensed to operate in interstate commerce on the Great Lakes.

The ships were owned and operated by the Cement Co. for the purpose of transporting cement produced at its mill in Michigan to ports in the various states bordering on the Great Lakes. While two of these ships were docked at Detroit, it was found necessary to keep their boilers fired so that deck machinery could be operated. This required periodic cleaning of the fires causing the emission of smoke which exceeded the maximum allowable under the ordinance.

In the state circuit court, the Cement Co. sought to enjoin criminal proceedings for a violation of the ordinance instituted against it in the Detroit Recorder's Court. The Michigan Supreme Court affirmed[5] the circuit court's refusal to grant relief, and as a result an appeal was carried to the United States Supreme Court.

Speaking for the majority, Mr. Justice Stewart upheld the decision of the Michigan court and declared that the ordinance is a valid local regulation. In rejecting the Cement Co.'s contention that the federal inspecting and licensing legislation[6] was preemptive and that the city ordinance, "materially affects interstate commerce in matters where uniformity is necessary," he said that the ordinance is an "even-handed" exercise of the state's police power in promoting the health and welfare of the city's residents and was neither discriminatory nor unduly burdensome on interstate commerce. It was further stated that the ordinance, fairly interpreted, is not in conflict with the federal statute which indicates a congressional intent to occupy only a limited field. The majority also felt that the local regulation in this case was not lacking in uniformity, because there was no showing that other conflicting regulations actually existed.

Mr. Justice Douglas wrote the dissenting opinion in which Mr. Justice Frankfurter concurred. He pointed out that the ordinance provided for the sealing of ships which failed to meet the standards established by it even though the same equipment had been federally licensed to operate in interstate commerce.[7] He felt that this provision, combined with that providing for criminal prosecution of the ship owners, obstructed the free use of a license granted under an act of Congress and consequently should be struck down as unconstitutional. The dissenting opinion concluded by saying that the question of uniformity of regulation does not depend upon the existence of contrary regulations in other localities, but rather upon the subject matter, which in this case does not admit of varying local controls.

The Court's approach to present day controversies involving local regulations of interstate commerce is based upon a foundation of its earlier leading decisions. The first of these was **Gibbons v. Ogden.**[8] In his now famous opinion, Mr. Chief Justice Marshall withdrew the meaning of "commerce," as used in the constitutional grant to Congress, from the depths of ambiguity. He reasoned that commerce encompasses activity involving traffic and commercial intercourse, including the instrumentalities and agencies which give it life. Marshall said that federal power to regulate commerce need not stop at the boundary line of a state, but may be introduced into its interior if it also affects activity in other states.[9]

About five years later, when faced with an attempt by a state to regulate navigable waters, Marshall held, with a majority of the Court, that where a state is properly exercising its police power to protect the health and welfare of its residents, and where there is no conflict with federal legislation, there is no reason to view the commerce clause as being violated.[10]

Cooley Case

In another leading case, decided in 1851, **Cooley v. Board of Wardens of Philadelphia,**[11] the Court was asked to determine the validity of a Pennsylvania statute requiring the use of pilots on ships entering and leaving Philadelphia's harbor, there being at the same time an act of Congress specifically delegating control of pilotage to the states. In his majority opinion, Mr. Justice Curtis said that the mere grant to Congress of the power to regulate commerce did not deprive the states of all their legislative prerogative in this field. He pointed out that many aspects of interstate commerce do not require the exclusive regulation of Congress, but on the contrary, may be best served by state regulation. The basis of this decision was the Court's realization that the state regulation dealt with a subject of a local character not requiring national uniformity.

In the **Huron** case, one of the cases cited as supporting the majority was **Kelly v. Washington.**[12] This case, decided in 1937, approved a Washington statute requiring the inspection of the hull and machinery of tug boats operating in interstate commerce along the Pacific Coast, its purpose being to insure safety and to determine seaworthiness. Since the federal ships[13] do not apply to tug boats, laws relating to the inspection of the Court found no conflict. It was held that a vessel which is actually unsafe is not a subject protected by the principle requiring uniformity of regulation. Mr. Chief Justice Hughes stated that there is nothing in the Constitution requiring Congress to enact legislation which would occupy the whole field of the subject matter being regulated. On the contrary, Congress may regulate only a limited field, and when it does so, state regulation outside its coverage is not forbidden or displaced, if otherwise admissible. He emphasized that a proper exercise of the state's police power is superseded only where the conflict with existing federal legislation is so direct and positive that the two acts cannot be reconciled.[14] In conclusion, however, he said that if the state attempted to impose standards relating to structure, design, equipment or operation which go beyond what is essential to safety, it would have encountered the principle that such requirements must be established through the action of Congress in declaring a uniform rule.[15]

The fact that the Detroit ordinance in **Huron** did not require structural alterations to the ships is significant, because if it had, the Court need only turn to a case it decided in 1959 for a recent precedent pointing the way. **Bibb v. Navajo Freight Lines, Inc.**[16] There, an Illinois statute requiring the use of contour mudguards on trucks was declared invalid, because its effect was to make illegal in Illinois the use of conventional mudguards allowed in almost all the other states and required in Arkansas. Since the necessity of welding contour mudguards to trucks coming from Arkansas would make rapid changeover impossible, and since there was evidence that this type of mudguard did nothing to promote safety, Mr. Justice Douglas, with whom seven members of the Court joined, felt that the Illinois law violated the commerce clause, because the diffculity of compliance and the conflict with the preexisting Arkansas statute would impose serious burdens on interstate truckers. Although Arkansas required conventional mudguards, in so doing, it nevertheless conformed to a uniform practice throughout the nation.

The dissenting justice in **Huron** leaned heavily on **Napier v. Atlantic Coast Line Railroad Co.**[17] as authority for their contention that there was a collision of local and federal law. In the **Napier** case one state required the installation of automatic fire doors on locomotives pulling interstate trains and another state required the use of cab curtains during the winter time. The Boiler Inspection Act[18] gave the Interstate Commerce Commission authority to specify the kinds of equipment to be used on locomotives, but the Commission had never issued regulations pertaining to these particular items. In striking down the state laws involved, the Court said, through Mr. Justice Brandeis, that the federal act precluded state legislation because it was intended to occupy the whole field, and the fact that the Commission had not exercised its powers to specify the type of equipment to be used made no difference.[19]

In comparing **Huron** to **Napier,** Mr. Justice Douglas thought that a close analogy could be drawn. Neither dealt with an inspection statute as did the **Kelly** case. Both involved a federal agency which could promulgate rules as to the type of equipment required, the Interstate Commerce Commission in **Napier** and the Coast Guard in **Huron.** Notice, however, that the local legislation in **Napier** required the installation of special equipment as did the **Bibb** case, while in **Huron** it did not. Is this not significant from the standpoint of the burden cast upon interstate commerce?

A case which has greater similarity to **Huron** in its reasoning is **South Carolina State Highway Dep't. v. Barnwell Bros., Inc.**[20] In upholding the validity of a South Carolina statute restricting the weight and width of motor vehicles using its highways, the Court said that although the commerce clause has been held of its own force to curtail state power to regulate interstate commerce in some measure, it did not forestall all state action affecting commerce. There are matters of local concern, the regulation of which affects interstate commerce but which, because of their local character and their number and diversity, may never be acted upon by Congress. Notwithstanding the commerce clause, the Court held that regulations of the type involved in this case should be left to the states in the absence of congressional action.

In contrasting the **Bibb** and **South Carolina Highway** cases, if one looks to the changing circumstances of interstate highway transportation between 1938, the year of the **South Carolina Highway** decision, and 1959, the year of the **Bibb** decision, at least part of the underlying reason for the Court's seeming change in attitude becomes apparent. Since the trucking industry has emerged over the years as a means of carriage comparable with the railroads in national importance, it appears that the former hesitancy of the Court to disturb the states' police powers in regulating the use of their highways has become somewhat dispelled in the balancing of local and national interests. Interference by the states has a more substantial effect on interstate highway transportation now than twenty-five years ago. In 1954, this changed attitude began to take shape when the Court held that the exclusion of an interstate trucking firm from the highways of Illinois conflicted with the intent of Congress as expressed in the Motor Carrier Act,[21] even though the purpose of the state statute was to punish the firm for violating Illinois highway regulations.[22] Perhaps it would be proper to conclude that in these later highway cases, the Court is placing greater emphasis on the extent to which interstate commerce is burdened and the susceptibility of the problem to congressional control. There seems to be an increasing concern with the difficulty interstate highway carriers have in conforming to the challenged state regulations. It is doubtful that the Court today would reason as it did in **Sporles v. Binford,**[23] where it said that when the subject of the regulation lies within the police power of the state, ". . . debatable questions as to reasonableness are not for the courts but for the legislature, . . . and its action within its range of discretion cannot be set aside because compliance is burdensome. . . ."[24]

The earlier cases apparently based their decisions more on whether or not interstate commerce was discriminated against than on principles of uniformity or the extent to which it was burdened.[25] If confronted with these same cases today it is questionable whether the Court would be so inclined to uphold these state laws if it felt that they were really an unreasonable burden and set up standards which did not conform with those existing in the rest of the nation. This theory is substantiated by **Morgan v. Virginia**[26] where the Court held invalid a Virginia statute requiring the segregation of white and colored passengers on interstate as well as intrastate carriers. All but one of the justices took the position that the state legislation violates the commerce clause when it unduly burdens interstate commerce in matters where uniformity is necessary. The Court recognized that the uniformity principle lacked precision and said that in its application it should be viewed in the light of the particular facts involved in each case.

Review

In reviewing the cases within the scope of this comment, one soon finds that when Congress has remained inactive, the Court is placed in the position of having to arbitrate the competing demands of state and national interests. While attempts have been made from time to time to work with mechanistic formulae and thus avoid judging,[27] they have ended in failure. The trend of the Court's recent thinking is well exemplified by **Southern Pacific Co. v. Arizona.**[28] An Arizona statute made it unlawful to operate a train of more than fourteen passenger or seventy freight cars. In 1941, the state sought to recover statutory penalties for violations of the statute, and the state supreme court upheld the act as a valid safety measure designed to reduce the number of accidents. Speaking through Mr. Chief Justice Stone, the Court reversed the state court and outlined various steps to facilitate the formation of a sound basis upon which judgment could be entered. First, any asserted violation of the commerce clause must be supported by relevant factual information which will afford a firm footing for an enlightened

(Continued On Page 5)

1. U.S. CONST. amend. X, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." With respect to interstate commerce, the states may in some instances constitutionally pass laws to protect the safety, health, and welfare of their citizens under this amendment. Wilson v. Black Bird Creek Marsh Co. 27 U.S. (2 Pet.) 245 (1829) is an early example.

2. U.S. CONST. art. I, sec. 8, "The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

3. 362 U.S. 440 (1960).

4. Detroit, Mich., Ordinance No. 167 -E.

5. 355 Mich. 227, 93 N.W. 2d 888 (1959).

6. REV. STAT. Secs. 417-19 (1875), as amended, 46 U.S.C. secs. 390-93 (1958).

7. 362 U.S. at 450-51.

8. 22 U.S. (9 Wheat.) 1 (1824). There it was held that a New York legislative license to Ogden violated the commerce clause in granting him exclusive rights to operate steamboats between New York City and various places in New Jersey; Gibbons held a federal license to operate between the same places.

9. *Id.* at 197.

10. Wilson v. Black Bird Creek Marsh Co. 27 U.S. (2 Pet.) 245 (1829). A Delaware statute authorizing the construction of a dam across a navigable stream was sustained as a means of enhancing the adjacent land values and of providing a more healthful environment for the residents of the area. By way of dictum, Marshall said that had Congress occupied the field, the Court would not hesitate to hold the Delaware act void.

11. 53 U.S. (12 How.) 299 (1851).

12. 302 U.S. 1 (1937).

13. 36 Stat. 462 (1910).

14. 302 U.S. at 10.

15. *Id.* at 15.

16. 359 U.S. 520 (1959).

17. 272 U.S. 605 (1926).

18. 43 Stat. 659 (1924), 35 U.S.C. Sec. 23 (1958).

19. 272 U.S. at 613.

20. 303 U.S. 177 (1938).

21. 49 Stat. 543 (1935), 49 U.S.C. Secs. 301-27 (1958).

22. Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

23. 286 U.S. 374 (1932).

24. *Id.* at 388-89.

25. An example of this philosophy is Morris v. Durby, 274 U.S. 135 (1926), where it was said, "In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

26. 328 U.S. 373 (1946).

27. *E.g.,* original package doctrine of Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

28. 325 U.S. 761 (1945).

NewFacultyMembers

William Mitchell has six new faculty members this year who bring to the school a variety of backgrounds in education and experience.

Jeanette J. Bluhm was born in Bertha, Minnesota. She graduated **magna cum laude** from Hamline University receiving her B.A. degree and received an M.A. degree from the University of Minnesota. She then attended Yale University Law School and graduated with a "B" average. Miss Bluhm practiced law for 12 years in New York City with the firm of Winthrop, Stimson, Putnam & Roberts. She then attented Columbia University Law School, received her LL.M. with an A- average. She also attended the Parker School of Foreign & Comparative Law at Columbia University. She taught high school English in Connecticut, and has served with the Civil Aeronautics Board in Washington. She is teaching Introduction to Law this semester and will teach Conflict of Laws next semester.

J. J. Bluhm

Charles Gordon is teaching Administrative Law this year. Mr. Gordon is the Regional Counsel in an area of 16 states for the Immigration and Naturalization Service of the U.S. Department of Justice. He graduated from New York University Law School and attended City College of New York. He is

C. Gordon R. W. Schnobrich

co-author of the outstanding work on immigration, "Immigration Law and Procedure" by Gordon and Rosenfield. He is the author of an article in the current issue of the Minnesota Law Review on "Right to Counsel In Immigration Proceedings."

Roger W. Schnobrich is sharing with Mr. William J. Erickson the course in Legal Accounting. Mr. Schnobrich graduated in 1952 from the University of Minnesota, where he received his B.B.S., and in 1954 from the University of Minnesota Law School. He is a member of the Order of the Coif and is a partner in the law firm of Erickson, Popham, Haik and Schnobrich.

Dr. Raymond B. Van der Borght was born in Belgium and received the degrees of Doctor of Philosophy and Doctor of Jurisprudence from the University of Louvain. He practiced law in Brussels for twenty-five years. For the last ten years he has lived in St. Paul, where he is International Operations Consultant to the General Counsel of Minnesota Mining and Manufacturing Company. Last winter he lectured in the Institute on Investments and Business Abroad given at William Mitchell. He will teach a course in Comparative Law during the second semester which will cover the great legal systems of the world and their judicial organizations. The principles of contracts, torts, negligence and sales under the various systems will be compared.

David L. White is now teach Labor Law. Mr. White is engaged in general practice with the firm of Faricy, Moore, Costello and Hart. He received his undergraduate de-

D. L. White Van der Borght

gree magna cum laude from Ohio University where he was president of the student body and Phi Beta Kappa. He was graduated from Harvard Law School.

Paul G. Zerby is associated with Mr. Robert J. Johnson in teaching Income Taxation. Mr. Zerby attended the University of Minnesota, where he received his B.A. in Economics and was graduated from Harvard Law School, after which he clerked for Chief Justice Peter Woodbury of the First Circuit Court of Appeals. Last year he was one of the lecturers at William Mitchell's Institute on Investments and Business Abroad. Mr. Zerby practices law with the firm of Dorsey, Owen, Barber, Marquart and Windhorst.

Hon. Douglas K. Amdahl will return to William Mitchell as an active faculty member in the sec-

D. K. Amdahl P. G. Zerby

ond semester. Judge Amdahl, who is an alumnus of our school of the class of '51, taught here for several years, but found himself too busy to continue two years ago. He was given a leave of absence on his promise to resume his teaching duties in the near future. He is keeping his promise and will instruct the course in Business Associations in the next semester.

Professional Responsibility Course Expands Schedule

By Kenneth Mitchell

Students entering their fourth and, hopefully, final year at William Mitchell are finding a reorganized two credit course on Professional Responsibility added to the curriculum.

The course implements the canons of legal ethics originally formulated by the American Bar Association and now familiar to every lawyer. While the original pronouncements served for many years, the extension of a lawyer's activities and duties led to several supplemental studies, with broader and more definitive reports.

The impelling purpose of the course is to bring to the attention of students, before they become lawyers, some of the situations they will encounter in their professional practice which involve problems of professional conduct. This course seeks to make the students aware that there are hazards in the practice of law and they must be alert to watch for these hazards and avoid stumbling into them. If there is any novelty in William Mitchell's approach to this troublesome area of legal education, about which the law schools, lawyers, and the courts have been concerned for many years, it is the comprehensiveness with which this covers so many types of situations in practice and so many problems of professional responsibility.

The course might almost be called a practical demonstration on how to build a reputation and keep it. Nor is reputation always a grandoise idea. It is sometimes founded on a series of little impressions that build respect, as evidenced by Mr. William H. Oppenheimer's series of practice tidbits under the title of "Law Office Management". This seemingly colorless topic became meaningful with the revelation of this speaker's high sense of duty to his clients and the meticulous care with which he protects his own reputation as a lawyer.

If the course benefits the individual students, it also benefits the profession as a whole. It takes only a passing familiarity with the headlines of some of the major newspapers to learn of members of the bar who are charged with violating their professional responsibilities. Whether the charges are proven or not is immaterial to this subject; the fact is that a lawyer's transgressions are page one news, which can and does affect the public's trust and the lawyer's income.

Last year's experience resulted in some strengthening of the course for the current year. The discussion of special problems in divorce practice was expanded by adding to Judge Theodore B. Knudson's exposition of the Family Court of Hennepin County a talk by Mr. Richard E. Kyle on the problems encountered in actual divorce trials. More time has been allotted for the lectures on problems in probate practice by Mr. David R. Brink, the relations between lawyers and physicians by Mr. Charles R. Murnane, and relations between lawyers and real estate and insurance men by Mr. Fred A. Kueppers, Sr.

A new speaker, Mr. Erwin Mitch Goldstein, will discuss relations of lawyers with accountants, and the problems a lawyer in general practice has when dealing with a lawyer who is a specialist in a limited field.

At the end of last year's course the members of the class were asked to write their comments and suggestions for the improvement of the course. A few came up with the idea that, while it is all right for "these $50,000 per year speakers" to tell us how they act in certain situations, how about having a young lawyer who is not yet making that kind of money tell us what he does in some of those forbidding situations? The Committee on Professional Responsibility liked the idea and selected as the speaker, although with some trepidation that it might not be meeting the financial stipulations of the suggestion, Mr. William J. Erickson, who will address the last session of the course on the subject, "Problems of Professional Responsibility as Viewed by the Young Lawyer".

Schedule

Candor and Fairness....Frank J. Hammond

Special Problems in Criminal Practice ...Judge John W. Graff

The Lawyer as a Fiduciary ....Judge Oscar R. Knutson

Justice for the Poor.....Professor Maynrad E. Pirsig, U. of Minn. Law School

Conflicting Interests .....John G. Dorsey

Special Problems in Probate Practice.....David R. Brink

Problems in Family Law Judge Theodore B. Knudson

Special Problems in Divorce Practice .....Richard E. Kyle

Advertising and Solicitation.....Robert F. Henson

The Lawyer and His Profession .....Philip Neville

Law Office Management..William H. Oppenheimer

Relations Between Lawyers and Physicians..Charles R. Murnane

Corporate Counsel.....Fordyce W. Crouch

Relations Between Lawyers and Real Estate and Insurance Men .....Fred A. Kueppers, Sr.

Relations Between Lawyers and Accountants .....Erwin Mitch Goldstein

The General Practioners' Problems In Dealing with Lawyer Specialists .....Mr. Goldstein

Special Problems in Trial Tactics .....Philip Stringer

Special Problems in Tax Practice.....Hayner N. Larson

Problems of Professional Responsibility as Viewed by the Young Lawyer ....William J. Erickson

Chairman Reports On Placement At William Mitchell

By Edward Soshnik, Chairman

Once a person has "placed" himself in the legal profession, there inevitably comes a day when he must "place" himself in a job. It is on that day that the neophite lawyer should be aware of the numerous opportunities in the field of law, a field which ranges from adoption to zoning.

A question is often asked, "Shouldn't any law student worth his salt be able to get his own job?" The answer is that the competent law student in the vast majority of cases does procure employment within a relatively short time after completion of school. But in too many cases it is only a job, sometimes taken because of economic necessity, and once the novelty of the new adventure has passed, the young lawyer realizes that he has made a mistake.

To avoid such a mistake, the law student should learn and be aware of the advantages and disadvantages of choosing a law firm as a career, of practicing corporation law, of using his legal knowledge with a business enterprise,

The Placement Bureau at William Mitchell College of Law is now in its fourth year of operation, and, while it is still in the formative stages, it has already proved to be of assistance to students and graduates. Many of the students are presently working and putting themselves through school in positions obtained through the Placement Bureau.

At present, it must be said that the Placement Bureau has not yet reached the level of the model placement program previously mentioned, but the program is young and eager and indications are that it will soon take a back seat to none in the placement field.

(Continued From Page 4)

judgment. Second, the mere legislative recital that the statute is a safety measure does not bind the Court; it must analyze the effect of the statute and make a determination for itself. Third, even if the Court deems it a safety measure, it must look at the total result and decide whether it is outweighed by the national interest to keep interstate commerce free from nonuniform local interferences.

Notwithstanding the Court's expressed desire in the **Southern Pacific** case to judge each fact situation on an individual basis, it has subsequently tended to look at the matter with an eye to tradition.[29] If the matter is one about which Congress has historically legislated, such as railroads as opposed to highways, the Court is more likely to hold that existing federal legislation precludes state regulation. Of course, the apparent scope of the federal act is an important factor. The more it appears to be a complete system of regulation, the more likely it is that the state law will be declared superseded.

Eminent students of constitutional law[30] have found it difficult to reconcile the Court's reasoning in the **Huron** and **Southern Pacific** cases. In **Southern Pacific,** Mr. Chief Justice Stone said that if one state could regulate train lengths, so could all the others. The result would be that interstate railroads would have to conform to, "a crazy quilt of State laws."[31] It was his opinion that where national uniformity is necessary, no regulation at all is preferable to the confusion and difficulty which would arise from a burdensome patchwork of state legislation. It was the possibility, not the actuality, of "a crazy quilt" which led the Court to invalidate the Arizona statute.

The apparent inconsistency between **Huron** and **Southern Pacific** may in part be reconciled by comparing the modes of transportation involved in each case. In distinguishing the **South Carolina Highway** decision from **Southern Pacific,** Mr. Chief Justice Stone noted that the cases involving state limitations on motor vehicle size and weight have an added element not present in the railroad cases. That element is the use of highways furnished and maintained by the state.[32] This appears to be sufficient to tip the scales in favor of state regulatory power. The attitude of the Court could well be that more extensive state control is permissible where the regulation has a direct relation to the cost of maintaining state owned transportation facilities as well as to the safety of the public.

It is quite possible that the same approach was adopted by Mr. Justice Stewart in analyzing the effects of the Detroit Smoke Abatement Code on ships using the city's harbor, a situation similar to that of the harbor pilots in the **Cooley** case. The health of the city's residents is a subject peculiarly of local concern, and, as an objective of local regulation, it appears to outweigh national uniformity more than other measures with less laudable judicially defined purposes.

As indicated above, the purpose of the state regulation, as construed by the Court, is of prime importance in determining its validity. Where the promotion of safety, for example, was a mere incident of denying an interstate carrier the right to operate in a manner most advantageous to it, the real purpose being to prevent competition, the Court found little difficulty in holding such state action unconstitutional. **Buck v. Kuykendall.**[33] On the other hand, in **Bradley v. Pub. Util. Comm'sn. of Ohio,**[34] the Court upheld an order denying an interstate carrier a certificate to operate over a congested state highway on the ground that it would be an undue hazard to the safety of the motoring public. In distinguishing the **Buck** case, the Court noted that the test employed there was the adequacy of existing transportation facilities, whereas in the **Bradley** case the

(Continued On Page 6)

Fourth In Series—Know Your Trustees

Judge Pearson Long Active As Trustee and Teacher

The Honorable Albin S. Pearson was born on January 27, 1894 at Amery, Wisconsin, and is a graduate of the academic and law departments of the University of Minnesota.

Judge Pearson's classmates at the University of Minnesota Law School included Stafford King, state auditor, and John Dulebohn, professor at the William Mitchell College of Law and formerly General Counsel of the Twin City Rapid Transit Company.

After receiving his LL.B. degree in 1916, Judge Pearson engaged in general practice. He served as a field artillery officer in World War I, and in 1920 became the first district commander of the Ramsey County American Legion.

Judge Pearson was elected to the Minnesota Legislature in 1923, re-elected in 1925, when he became Chairman of the Senate Judiciary Committee, and was a member of the 1926 State Crime Commission. In 1930, he was appointed Ramsey County Probate Judge.

In 1931, he and five other Minnesota attorneys undertook the revision of the Minnesota Probate Code. This code, somewhat revised in 1889, had remained virtually unchanged since it was originally enacted by the Minnesota Legislature in 1858. A careful study of the existing probate code and judicial decisions subsequent to 1849 was made. In 1934, the 200 sections of the proposed probate code were finished. After receiving the endorsement of the Minnesota State Bar Association, the new code was presented to the Minnesota Legislature and was enacted into law in 1935. It remains unchanged except for a few minor corrections made in 1939.

Appointed Ramsey County District Judge in 1939 after nine years in the Probate Court, Judge Pearson has served in this position for over 22 years. In addition to his judicial duties, he served as an instructor in probate law at the St. Paul College of Law, and later at the William Mitchell College of Law. In 1960, he retired from the faculty after teaching probate law for 25 years.

The judge was a trustee of the former St. Paul College of Law from 1939 to 1956 and he is presently a member of the Board of Trustees and Treasurer of the William Mitchell College of Law.

Judge Pearson recently attended the 50th reunion of his high school graduating class and the 45th reunion of his law school graduating class. He has been a member of the St. Paul Athletic Club for over 40 years and is presently serving as Vice President. Judge Pearson is married and has two sons and one daughter.

The Law As I See It

(Continued From Page 4)

taught me that the lawyers who drive air-conditioned automobiles, play golf whenever the notion strikes them and live to sun-ripened old age, are those who can make correct decisions, reach the right answers to problems. This ability is the pay-dirt in the practice.

Question Six: As I come to the bar from a good law school, am I prepared to practice? Answer: Probably not. Ours is the least proficient of all professions, I think, in craftsmanship. We come to the bar pretty familiar with what certain selected courts have held in disputed and obscure matters in which we probably will have no actual concern at any time. We have learned what meaning harassed and perplexed judges have by force of necessity given to language wholly without meaning, and how the courts have rescued deserving litigants out of the messes into which the errors of counsel have plunged them. In short, we are thoroughly conversant with the case books. But we are probably devoid of the tools of the practice, such as writing, speaking, investigating facts or alleged facts, divining law in circumstances, the gentle arts of persuasion, the available protections against the pressures of controversy.

Question Seven: Why be a lawyer? Answer: The best reason is the joy brought by the daily struggle with human problems, the sense of achievement, and of service. If you just want to make money, you better go into business.

Question Eight: How should a lawyer fix his fees? Answer: I don't know, and I don't think anybody else does.

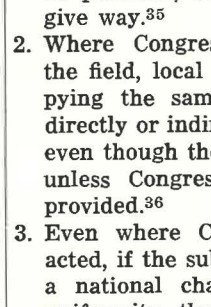
Alumni Briefs

The **Opinion** is pleased to acknowledge receipt from Chief Justice James T. Harrison of the Supreme Court of Montana, LL.B. 1916, current news regarding some alumni in Montana.

Associate Justice Albert H. Angstman, LL.B. 1912, has retired from the Montana Supreme Court on April 9, 1961 having served as an Associate Justice for some 28 years, which is the longest period of service in the history of the Montana Supreme Court.

District Judge Clifford E. Holt, LL.B. 1912, retired from the District Court Bench in 1960 after completing 24 years of service as a District Judge.

Raymond J. Quinlivan, who graduated from the St. Paul College of Law in 1922, died at his home in St. Cloud, Minnesota, on October 12. Mr. Quinlivan, who was born in 1894 and was a graduate of Carleton College, practiced law in St. Cloud from the time of his admission to the bar in 1922. He was City Attorney of St. Cloud for eight years.



Mr. Quinlivan was well known throughout the state. He was a member of the Board of Regents of the University of Minnesota from 1935 until his death, and was Chairman of the Board for eleven years. As an alumnus he took an active interest in the affairs of the William Mitchell College of Law.

John A. Burns, 79, retired Dean of William Mitchell College of Law, passed away September 11, 1961.

Dean Burns received his elementary and high school education at Columbus, Wisconsin. He received his LL.B. Degree from the St. Paul College of Law in 1904 and in 1905 received his LL.M. Degree from the University of Minnesota Law School.

While attending the St. Paul College of Law he was instructor at the West St. Paul High School, and superintendent of schools. Mr. Burns practiced law as City Attorney of West St. Paul. He was Assistant Corporation Counsel of the City of St. Paul for nine years.

Dean Burns became a member of the St. Paul College of Law faculty in 1920 and was made Trustee in 1939 and appointed Secretary to the Corporation in 1945 and Vice President in 1949. He was appointed Dean in 1952 and remained in that capacity until his retirement in 1958.

He was a past President of the Ramsey County Bar Association and of the Minnesota State Bar Association, and was a member of the American Bar Association.

Rolf E. Dokmo, president of Burdett-Smith company and a graduate of the St. Paul College of Law in 1927, has passed away.

Mr. Dokmo, in affiliation with West Publishing Company, was a consistant and generous contributor to William Mitchell along with other executives of the company.

The affairs of Burdett-Smith Company are being caried on by James A. Rafftery, vice president and a 1951 graduate of William Mitchell.

Prenatal Injuries (Continued From Page 3)

child be regarded as dicta, as it should, then the question remains open in most jurisdictions as to the fate of the nonviable child.

The **Sinkler** case dismisses the viability issue by concluding that it has little to do with the basic right to recover and that the question is primarily one of causation.

Recovery under wrongful death statutes involves basically the same problems. In the words of Judge Graven:

"The division of the courts doesn't turn on whether the infant did or did not live following birth, but on the broader question of whether recovery should be permitted at all for prenatal injuries to a viable child. The writers and annotators in this field generally treat the cases permitting recovery for prenatal injury to a viable child in any situation as constituting one line of authority and those not in accord as constituting the other." [41]

This conclusion follows from the purpose of the wrongful death statutes which was to give the decedent's representative the cause of action the deceased person could have maintained had he lived. However, at least two states which allow recovery for prenatal injuries when the child is born alive deny the cause of action when the child is born dead.[42] One writer supports their view with the argument that unborn infants are separate entities in the biological sense only.[43] They become legal persons at birth and only then does the potential liability become complete. If they die before birth there would be no liability because there would have been no damage to a legal person. Under this view there is a wrong for which there would be no remedy. Would it be fair to allow a child who lived one hour to recover while the personal representative of the child who was born dead received nothing? This position probably results in an unnecessary distinction although it does avoid the causation problem in miscarriages. Under the recovery rule all miscarriages result in a potential liability in someone.

Sinkler v. Kneale does not involve a wrongful death statute, but the decision is probably broad enough to allow recovery in such a situation.

The principal case together with **Smith v. Brennan** present as thorough an examination of a subject as can be found in the cases on any subject. **Sinkler** does not add anything particularly new to the field of prenatal injuries, but it does reaffirm and add weight to the growing line of authorities allowing recovery.

In considering local law on the subject of prenatal injuries it must be recognized that Minnesota was the first jurisdiction to allow recovery for the wrongful death of the child before birth.[44] In **Verkennes v. Corniea** an action was brought against the physician for injuries to a viable child during delivery which resulted in death. In allowing recovery the court emphasized the fact that the child was a viable person. The Minnesota Supreme Court has never decided a case involving a nonviable child, but in the light of additional precedent and expanding medical knowledge it would probably agree with the **Sinkler** case today.

Remaining for future cases to decide is the effect of contributory negligence by the mother on the right of the child to recover. To date this problem has not been considered. Perhaps it can be resolved in the same manner as passenger claims in auto accidents. Just as the contributory negligence of the driver does not prevent his passenger from recovering from the other driver, the child should not be precluded from bringing suit against the other party because the mother was also negligent. This may result in third party claims against the mother, but that does not directly concern the injured party.

Another problem, not serious yet, is the effect of fallout from atomic tests on unborn babies. To what extent this will cause developmental defects and result in tort claims cannot be predicted.

In conclusion it can be said that the development of the law of prenatal injuries truly portrays the flexibility of the common law without the aid of statute. Here one finds the law proceeding with caution, yet keeping pace with changing and expanding medical knowledge. As was stated by Judge Graven:

"Seldom in the law has there been such an overwhelming trend in such a relatively short period of time as there has been in the trend toward allowing recovery for prenatal injuries to a viable infant." [45]

(Prenatal Injuries)

31. The term used by Justice Frankfurter in Morgan v. Virginia, 328 U.S. 373, 388 (1946).
32. 225 U.S. at 783.
33. 267 U.S. 307 (1925).
34. 289 U.S. 92 (1933).
35. *E.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

State Police Power (Continued From Page 5)

denial was to promote safety, and the test was the congestion of the highway.

In conclusion, it may be said that under certain conditions, local governments may regulate interstate carriers under the police powers reserved to the states and still be in conformity with the commerce clause of the federal constitution. The standards for testing the validity of such local control may be briefly stated as follows:

1. Where there is direct conflict with an express regulation enacted by Congress acting within its province, the local act must give way.[35]
2. Where Congress has occupied the field, local regulations occupying the same field, whether directly or indirectly, must yield even though there is no conflict, unless Congress has otherwise provided.[36]
3. Even where Congress has not acted, if the subject matter is of a national character requiring uniformity throughout the nation, local action tending to hamper this objective is void.[37]
4. Where interstate commerce would be unduly burdened or restrained by local control, the local legislation will be struck down as an obstruction to the free flow of commercial intercourse between the states.[38]
5. The motivating reasons underlying the local action will be scrutinized to determine whether or not its purpose is a valid exercise of the state's reserved powers.[39]

Huron and its predecessors leave much to be desired in that the Court has not been consistent in its application of reasoning to fact. By drawing fine lines to distinguish the circumstances of cases leading to apparently incompatible conclusions, the Court has left little in the way of precedents to guide the lower courts and local legislatures. As the different modes of interstate carriage change in their relative importance, there is little doubt that the Court will view local regulations from varying perspectives. The combination of these two factors makes it difficult to predict the direction future decisions will take, or, for that matter, to make an accurate judgment of the effect of **Huron** on local regulation of interstate carriers other than the Detroit Smoke Abatement Code as applied to Great Lakes shipping.

36. *E.g.*, Napier v. Atlantic Coast Line Railroad Co., 272 U.S. 605 (1926).
37. *E.g.*, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). Cases holding that the state regulation was of a local character not requiring national uniformity include: 1) Smith v. Alabama, 124 U.S. 465 (1888). An Alabama statute requiring an examination and license of train engineers before operating in the state. 2) Nashville, Chattanooga and St. Louis Railroad Co. v. Alabama, 128 U.S. 96 (1888). Statute requiring an examination of railroad employees as to vision and color blindness. 3) New York, New Haven & Hartford Railroad Co. v. New York, 165 U.S. 628 (1897). New York statute forbidding the use of furnaces or stoves in passenger trains and requiring guard posts on railroad bridges. 4) Erb. v. Morasch, 177 U.S. 584 (1900). Municipal ordinance limiting the speed of trains in a city. 5) Atlantic Coast Line Railroad Co. v. Georgia, 234 U.S. 280 (1914). Georgia statute requiring electric headlights on locomotives.
38. *E.g.*, Kansas City Southern Railroad Co. v. Kaw Valley Drainage District, 233 U.S. 75 (1914). Court held invalid an order requiring the railroad to remove its bridges over a river for flood control purposes.
39. *E.g.*, Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92 (1933)

Non-Profit Org.
U. S. POSTAGE
PAID
Saint Paul, Minn.
Permit No. 1300

The Student Bar Association
of
William Mitchell College of Law
2100 Summit Ave.
St. Paul 5, Minn.